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Supreme Court of the United States

OCTOBER TERM, 1940.

No. .

HOWARD S. PALMER, JAMES LEE LOOMIS and HENRY B. SAWYER, as Trustees of The New York, New Haven and Hartford Railroad Company,

Petitioners,

—against—

JOHN J. McCARTHY,

Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

The Petitioners, Howard S. Palmer, James Lee Loomis and Henry B. Sawyer, Trustees of the property of The New York, New Haven and Hartford Railroad Company, pray that a writ of certiorari issue to review the decree of the Circuit Court of Appeals for the Second Circuit entered in the above cause on August 1, 1940, affirming a judgment of the District Court of the United States for the Eastern District of New York, and respectfully represent:

THE OPINIONS OF THE COURTS BELOW.

The opinion of Judge Moscowitz in the District Court of the United States for the Eastern District of New York is reported in 29 F. Supp. 585 (R. 528-537). The opinion by Judge Chase in the Circuit Court of Appeals for the Second Circuit, dated July 17, 1940, has not yet been reported but appears at pages 551 through 555 of the Record.

Jurisdiction.

1. The jurisdiction of this Court is invoked under §240, subdivision (a), of the Judicial Code, as amended by the Acts of February 13, 1925, c. 229, §1, 43 Stat. 938; of January 31, 1928, c. 14, §1, 45 Stat. 54; and of June 7, 1934, c. 426, 48 Stat. 926; 28 U. S. C. A. §347(a).

2. The cases believed to sustain the jurisdiction of this Court are:

Pepper v. *Litton*, 308 U. S. 295;
Ford Motor Co. v. *Beauchamp*, 308 U. S. 331.

3. The decree of the Circuit Court of Appeals sought to be reviewed, entitled Order for Mandate, is dated August 1, 1940 (R. 556). This decree affirms the judgment of the District Court.

Statutes Involved.

The statutes involved are the Federal Employers' Liability Act of 1908 (Act of April 22, 1908, c. 149, §1, 35 Stat. 65; 45 U. S. C. A. §51), the Railroad Retirement Act of 1937 (Act of June 24, 1937, c. 382, Part I, §1, 50 Stat. 307; 45 U. S. C. A. §228a), and the Carriers Taxing Act of 1937 (Act of June 29, 1937, c. 405, §11, 50 Stat. 440; 26 U. S. C. A. §1500).

The relevant portions of these statutes are set forth in the appendix, *infra*, pages 9 to 13, inclusive.

Summary Statement of the Matter Involved.

The complaint alleges that on September 23, 1938 plaintiff(respondent) was employed by the defendants(petitioners) as a brakeman; that east of defendants' station at

Danbury, Connecticut, he sustained injuries due to defendants' negligence (R. 5, 6). The action was brought under the Federal Employers' Liability Act, Act of April 22, 1908, c. 149, §1, 35 Stat. 65; 45 U. S. C. A. §51 (R. 5). Judgment was entered in favor of the plaintiff in the amount of $22,959.65 on October 23, 1939 (R. 540, 541).

The questions of fact and of law as to whether defendants would be entitled to a reduction of a verdict for plaintiff because of the provisions of the Railroad Retirement Act of 1937 were by stipulation of the parties left to the trial court to decide rather than to the jury (R. 465). The jury found a verdict for the plaintiff in the sum of $22,500 (R. 479). The trial court held that plaintiff was not "permanently and totally disabled for regular employment for hire" within the meaning of §228b, subdivision a(3), of the Railroad Retirement Act of 1937. *McCarthy* v. *Palmer, supra,* 29 F. Supp. 585, 588 (R. 530-536). The trial court also decided that defendants had no right to a reduction of plaintiff's damages in a suit of this nature, regardless of whether or not the injuries were of a total and permanent character. *McCarthy* v. *Palmer, supra,* 29 F. Supp. 585, 588, 589 (R. 530-537). An order denying defendants' motion to reduce the verdict because of the provisions of the Railroad Retirement Act of 1937 was thereupon entered (R. 537-539).

The Questions Presented.

(1) Whether the trial court erred in holding that defendants in a suit under the Federal Employers' Liability Act had no right to a reduction of plaintiff's damages by reason of the provisions of the Railroad Retirement Act of 1937 regardless of whether or not plaintiff was totally and permanently disabled for regular employment for hire.

(2) Whether the trial court erred in holding that defendants in a suit under the Federal Employers' Liability Act had no right to a reduction of plaintiff's damages by reason of the provisions of the Railroad Retirement Act of 1937 where plaintiff was not totally and permanently disabled for regular employment for hire.

Specification of Errors.

The Circuit Court of Appeals erred:

1. In holding that defendants were not entitled, under the provisions of the Railroad Retirement Act of 1937, to a reduction of the plaintiff's judgment by the amount of the annuity he would be eligible to receive upon reaching the age of 60, by one-half of that annuity, by the amount contributed in taxes by defendants toward that annuity, or by any other amount.

2. In affirming the judgment of the District Court.

Reasons Relied on for the Granting of the Writ.

The petitioners contend that the writ of certiorari should be granted for the following reasons:

1. *This case presents an important question of federal law which has not been, but should be, determined by this Court.*

Defendants' Exhibit I (R. 522, 523), submitted as an exhibit for the court (R. 564), shows that plaintiff was 54 years old on December 17, 1938, and that he had rendered over 30 years of service to defendants.

Section 2 of the Railroad Retirement Act of 1937 makes

eligible for annuities, once they have ceased to render compensated service to the carrier, the following persons:

(1) individuals who shall be 65 years of age or over;

(2) individuals who shall be 60 years of age or over, and

(a) shall have completed 30 years of service, or

(b) shall have become totally and permanently disabled for regular employment for hire;

(3) individuals, without regard to age, who shall have completed 30 years of service and who are totally and permanently disabled for regular employment for hire.

Under §3 of the Act the annuity is computed by multiplying an individual's "years of service" by fixed percentages of his "monthly compensation".

If at the time of the trial plaintiff had been totally and permanently disabled for regular employment for hire, his injury and his thirty years of service would have entitled him to an immediate annuity of $83.20 a month. In any event, he had only to wait the six years before reaching the age of sixty to become eligible beyond all doubt for a retirement pension (R. 522, 523).

In order to provide money for payment of the annuities, the Carriers Taxing Act of 1937 levies an income tax on employees and an excise tax of like amount on employers (26 U. S. C. A. §§1500, 1520). The money thus collected is paid into the general fund of the United States Treasury (26 U. S. C. A. §1530). Annually enough money is appropriated to a special Railroad Retirement Account to provide for estimated disbursements during the coming year (45 U. S. C. A. §228*o*). A sufficient tax is imposed so

that the government is assured of paying no part of the expense of the annuities (Cong. Rec., Vol. 79, p. 13646).

Whether in view of the provisions of the statutes setting up a national retirement system for railroad employees defendants are entitled to any reduction of plaintiff's verdict presents, as Judge Chase of the Circuit Court remarked, an interesting question as to the measure of damages. The question is not only an interesting one but also a new one never before determined by this Court. A number of lower courts have already passed on the matter under various fact situations, and have in every case except the present one ruled in defendants' favor.

> *Davis* v. *Trustees of Chicago, Indianapolis & Louisville Ry. Co.*, U. S. D. C., N. D. Ind., Judge Slick (December, 1937);
>
> *Nesbitt* v. *Louisville & Nashville R. R. Co.*, 10th Jud. Cir., Ala., Judge Clark (May 11, 1939);
>
> *Engel* v. *Pennsylvania R. R. Co.*, City Court, Calumet, Ill., Judge Posanski (1938);
>
> *Petry* v. *Pennsylvania R. R. Co.*, U. S. D. C., E. D. N. Y., Docket No. 200, Judge Galston (June 20, 1939).

It is peculiarly the function of this Court to settle the relationship of federal statutes to one another. Definitive action is particularly important where the point at issue will appear constantly in numerous cases. The present situation involves a point which can be raised in any suit under the Federal Employers' Liability Act. If the two questions presented be ruled on at this time, federal and state courts will be relieved of their uncertainty and will be able to dispose of the problem regardless of the particular fact situation offered.

2. *This case was decided in a way probably in conflict with applicable decisions of this Court.*

The Federal Employers' Liability Act has often been held by this Court to allow a plaintiff suing under it to recover his full pecuniary loss, including his past and prospective loss of earnings. See, for example, *Chesapeake & Ohio R. R. Co.* v. *Carnahan*, 241 U. S. 241, 243. But of course a defendant may always prove any facts tending to show plaintiff has not suffered damages to the extent claimed.

In the determination of damages arising from injuries, one element is the impairment of earning capacity. This impairment involves a pecuniary or economic loss which is measured in part by loss of future wages. To estimate this wage loss the trier of fact takes into consideration the various things which may enlarge or lessen the loss, such as prospective wage increases or wage reductions. Since a pension is given as a form of wages or in lieu of wages, the recipient of one is to that extent cutting down his future wage loss. But whether or not a pension be considered to be a form of wages or in lieu of wages, an injured employee's pecuniary loss is mitigated if he receives a pension. The possibility of obtaining a pension is, therefore, under any theory a relevant factor in the determination of an injured employee's damages.

Whether a plaintiff becomes eligible for an annuity on account of permanent and total disability or for some other reason is significant only as deciding the time when the annuity may commence. It is not the reason for the annuity which is fundamental to the issue of damages but rather the fact that a plaintiff's pecuniary loss is diminished by receipt of an annuity.

The familiar principle that a defendant is not entitled to have the damages for which he is liable reduced by

proving that the plaintiff has received compensation for the loss from a collateral source wholly independent of defendant does not control here. In this case defendants have contributed toward whatever annuity plaintiff may receive. This fact relates the situation to the equally familiar principle that a plaintiff cannot set up as an element of his damages anything as to which he has received compensation from defendant. *Southwestern Brewery & Ice Co.* v. *Schmidt*, 226 U. S. 162, 169.

Under the decisions of this Court, therefore, it would be inequitable to let plaintiff recover for loss of future earnings without regard for the diminution of that loss in the form of a pension which defendants' contributions help to make possible.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari should be granted.

EDWARD R. BRUMLEY,
Counsel for Petitioners.

R. M. PEET,
Of Counsel.

Appendix.

STATUTES INVOLVED.

Section 1 of the Federal Employers' Liability Act, 45 U. S. C. A. §51, reads as follows:

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

Section 5 of the Federal Employers' Liability Act, 45 U. S. C. A. §55, reads as follows:

> "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided*, That in any action brought against any such common carrier under or by virtue of any

of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought."

Section 2 of the Railroad Retirement Act of 1937, 45 U. S. C. A. §228b, reads in part as follows:

"(a) The following-described individuals, if they shall have been employees on or after the enactment date, shall, subject to the conditions set forth in subsections (b), (c), and (d), be eligible for annuities after they shall have ceased to render compensated service to any person, whether or not an employer as defined in section 228a (a) (but with the right to engage in other employment to the extent not prohibited by subsection (d)):

1. Individuals who on or after the enactment date shall be sixty-five years of age or over.

2. Individuals who on or after the enactment date shall be sixty years of age or over and (a) either have completed thirty years of service or (b) have become totally and permanently disabled for regular employment for hire, but the annuity of such individuals shall be reduced one one-hundred-and-eightieth for each calendar month that they are under age sixty-five when the annuity begins to accrue.

3. Individuals, without regard to age, who on or after the enactment date are totally and permanently disabled for regular employment for hire and shall have completed thirty years of service.

Such satisfactory proof of the permanent total disability and of the continuance of such disability until age sixty-five shall be made from time to time as may be prescribed by the Board. If the individual

fails to comply with the requirements prescribed by the Board as to proof of the disability or the continuance of the disability until age sixty-five, his right to an annuity under subdivision 2 or subdivision 3 of this subsection by reason of such disability shall, except for good cause shown to the Board, cease, but without prejudice to his rights under subdivision 1 or 2(a) of this subsection. If, prior to attaining age sixty-five, such an individual recovers and is no longer disabled for regular employment for hire, his annuity shall cease upon the last day of the month in which he so recovers and if after such recovery the individual is granted an annuity under subdivision 1 or 2(a) of this subsection, the amount of such annuity shall be reduced on an actuarial basis to be determined by the Board so as to compensate for the annuity previously received under this subdivision.

(b) An annuity shall be paid only if the applicant shall have relinquished such rights as he may have to return to the service of an employer and of the person by whom he was last employed; but this requirement shall not apply to the individuals mentioned in subdivision 2(b) and subdivision 3 of subsection (a) prior to attaining age sixty-five.

* * * * * * * * *

(d) No annuity shall be paid with respect to any month in which an individual in receipt of an annuity hereunder shall render compensated service to an employer or to the last person by whom he was employed prior to the date on which the annuity began to accrue. Individuals receiving annuities shall report to the Board immediately all such compensated service."

Section 3 of the Railroad Retirement Act of 1937, 45 U. S. C. A. §228c, reads in part as follows:

"(a) The annuity shall be computed by multiply-

ing an individual's 'years of service' by the following percentages of his 'monthly compensation': 2 per centum of the first $50; 1½ per centum of the next $100; and 1 per centum of the next $150."

Section 10 of the Railroad Retirement Act of 1937, 45 U. S. C. A. §228j, reads in part as follows:

"(a) There is hereby established as an independent agency in the executive branch of the Government a Railroad Retirement Board, to be composed of three members appointed by the President, by and with the advice and consent of the Senate. * * *

* * * * * * * * *

(b) 3. The Board shall from time to time certify to the Secretary of the Treasury the name and address of each individual entitled to receive a payment, the amount of such payment, and the time at which it should be made, and the Secretary of the Treasury through the Division of Disbursements of the Treasury Department, and prior to audit by the General Accounting Office, shall make payment in accordance with the certification by the Board."

Section 12 of the Railroad Retirement Act of 1937, 45 U. S. C. A. §228*l*, reads as follows:

"No annuity or pension payment shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated."

Section 15 of the Railroad Retirement Act of 1937, 45 U. S. C. A. §228*o*, reads in part as follows:

"(a) There is hereby created an account in the Treasury of the United States to be known as the Railroad Retirement Account. There is hereby authorized to be appropriated to the account for each fiscal year, beginning with the fiscal year ending June

30, 1937, as an annual premium an amount sufficient, with a reasonable margin for contingencies, to provide for the payment of all annuities, pensions, and death benefits in accordance with the provisions of this Act and the Railroad Retirement Act of 1935. Such amount shall be based on such tables of mortality as the Railroad Retirement Board shall from time to time adopt, and on an interest rate of 3 per centum per annum compounded annually. The Railroad Retirement Board shall submit annually to the Bureau of the Budget an estimate of the appropriation to be made to the account."

Section 2 of the Carriers Taxing Act of 1937, I. R. C. §1500, 26 U. S. C. A. §1500, reads in part as follows:

"(a) In addition to other taxes, there shall be levied, collected, and paid upon the income of every employee a tax equal to the following percentages of so much of the compensation of such employee as is not in excess of $300 for any calendar month, earned by him after December 31, 1936— * * *"

Section 3 of the Carriers Taxing Act of 1937, I. R. C. §1520, 26 U. S. C. A. §1520, reads in part as follows:

"(a) In addition to other taxes, every employer shall pay an excise tax, with respect to having individuals in his employ, equal to the following percentages of so much of the compensation as is not in excess of $300 for any calendar month paid by him to any employee for services rendered to him after December 31, 1936: * * *"

Section 7 of the Carriers Taxing Act of 1937, I. R. C. §1530, 26 U. S. C. A. §1530, reads in part as follows:

"(a) The taxes imposed by this subchapter shall be collected by the Bureau of Internal Revenue and shall be paid into the Treasury of the United States as internal-revenue collections."

SEP 9
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 370.

HOWARD S. PALMER, JAMES LEE LOOMIS and HENRY B. SAWYER, as Trustees of The New York, New Haven and Hartford Railroad Company,

Petitioners.

against

JOHN J. McCARTHY,

Respondent.

BRIEF ON BEHALF OF THE RESPONDENT, JOHN J. McCARTHY, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

THOMAS J. O'NEILL.
Attorney for Respondent.

THOMAS J. O'NEILL,
JOSEPH G. SAILE,
of Counsel.

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POINT A—The evidence in the record does not allow the petitioners to raise in this court the question which they seek to present as Question No. (1) in their petition, to wit: "(1) Whether the trial court erred in holding that defendants in a suit under the Federal Employers' Liability Act had no right to a reduction of plaintiff's damages by reason of the provisions of the Railroad Retirement Act of 1937 regardless of whether or not plaintiff was totally and permanently disabled for regular employment for hire", because the trial court, pursuant to stipulation of the parties found as a finding of fact that "upon the record * * * it cannot be found that the nature of plaintiff's injury is such that, notwithstanding its seriousness and probable permanent continuation, he would be prevented thereby from following any substantial gainful occupation. At most the evidence establishes that this plaintiff will be unable to follow his former occupation, but it does not establish within the requirements of legal evidence that he is disabled for all work. This is substantially the norm provided by Section 228b, Subdivision a (3), and the defendants, upon whom the burden of establishing the defense rests, have failed to satisfy the requirements for a finding justifying the application of the foregoing provision" 6

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POINT B—The Trial Court committed no error in holding that the defendants were not entitled to a reduction of the plaintiff's verdict by reason of any of the other sections of the Railroad Retirement Act of 1937, or by reason of Section 5 of the Employers' Liability Act, and the Circuit Court of Appeals correctly affirmed the decision of the Trial Court in denying any such reduction 10

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Supreme Court of the United States

OCTOBER TERM, 1940.

No. .

HOWARD S. PALMER, JAMES LEE LOOMIS and HENRY B. SAWYER, as Trustees of The New York, New Haven and Hartford Railroad Company,

Petitioners,

against

JOHN J. McCARTHY,

Respondent.

BRIEF ON BEHALF OF THE RESPONDENT, JOHN J. McCARTHY, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

1

The Opinions of the Courts Below

The opinion of Judge Moscowitz in the District Court of the United States for the Eastern District of New York is reported in 29 F. Supp. 585 (R. 528-537). The unanimous opinion by Judge Chase of the Circuit Court of Appeals for the Second Circuit dated July 17, 1940 has not yet been reported, but appears at pages 551-555 of the Record.

2

Statutes Involved

Relevant statutes are printed in the appendix hereto.

3

Statement of the Case

This action was brought by the plaintiff (Respondent) under the Federal Employers' Liability Act (U. S. C. A. Title 45, Section 51, *et seq.*) to recover damages for serious and permanent personal injuries sustained by him on September 23, 1938, at a time when he was employed by the defendants (Petitioners) as a brakeman, and as such was a member of a crew in charge of a certain train, and at a point approximately 100 feet east of the Danbury station of the defendants, while the plaintiff was coming out of a caboose and turning on the platform of the caboose preparatory to standing on the steps on the south side of the caboose in order that when the train reached the station he could get off, plaintiff was caused to trip and fall from the caboose by reason of a worn, torn and defective burlap mat, which had been nailed to the platform of the caboose and negligently maintained by the defendants for some time prior to the happening of the accident and about which the plaintiff had complained to his superior, the conductor of said train, and which said conductor had promised to repair.

Concededly, the plaintiff, at the time he was injured, was engaged in interstate commerce.

The action resulted in a verdict in favor of the plaintiff in the amount of $22,500, and judgment was entered on October 23, 1939, in the amount of $22,959.65.

Upon the trial of the case the defendants contended that they were entitled to a reduction of whatever damages the jury awarded by reason of the provisions of the Railroad Retirement Act of 1937 (45 U. S. C. A., Secs. 228a, *et seq.*).

By stipulation of the parties, the questions of fact and of law as to whether defendants would be entitled to a reduction of the damages awarded by reason of the provisions of the Railroad Retirement Act of 1937, were left to the Trial Judge to thereafter decide (R. 465).

After exhaustive briefs had been submitted by both sides and after great consideration and deliberation, the Trial Court found upon the facts that the plaintiff was not "permanently and totally disabled for regular employment for hire" within the meaning of Section 228b, Subdivision a (3), of the Railroad Retirement Act of 1937 (*McCarthy* v. *Palmer, supra,* 29 F. Supp. 585; R. 530-536).

The defendants further contended, at the trial, that even though plaintiff was not "permanently and totally disabled for regular employment for hire" so as to bring him within the above named Section 228b, Subdivision a (3) of the Railroad Retirement Act of 1937, that they were nevertheless entitled to a reduction by virtue of Section 228b, Subdivision a (2), providing that railroad employees who shall be 60 years of age and shall have completed 30 years of service, shall be entitled to a pension.

The Trial Court in its opinion denied such a reduction under this Section (R. 536-537) and the Circuit Court of Appeals affirmed the Trial Court and wrote upon this question in its opinion (R. 555).

Petitioners seek to raise as a question upon this application "whether the Trial Court erred in holding that defendants in a suit under the Federal Employers' Liability Act had no right to a reduction of plaintiff's damages by reason of the provisions of the Railroad Retirement Act of 1937, regardless of whether or not plaintiff was totally and permanently disabled for regular employment for hire."

This question is not presented by the facts in the record herein, as there is no evidence in the record which would justify the raising of any such question in this Court, and no such question was raised by the petitioners in the Argument to the Circuit Court of Appeals.

The petitioners argue at length here with reference to this question which is not presented by this record, as to whether or not a defendant carrier would be entitled to a reduction of plaintiff's damages under the Railroad Retire-

ment Act of 1937 "if he was totally *and* permanently disabled for regular employment for hire".

It is undeniable that this question is not presented by this record, because the only evidence is to the effect that while the plaintiff's injuries are of a permanent character, he was not and is not *totally and* permanently disabled for regular employment for hire. We have here only a question of a partial, though serious, permanent injury which does not totally disable this plaintiff for regular employment for hire.

The petitioners argue this question above stated, although it is not presented by the record, and petitioners' possible excuse therefor is, that possibly through inadvertence, the District Judge, after finding affirmatively—as he was required to do by the evidence—that the plaintiff was *not totally and permanently disabled for regular employment for hire,* made a statement (which was not at all necessary to his decision of the case, and beyond the facts in this case), that even if his injuries were of a total and permanent character no reduction could be made where the claim to reduction is predicated upon the provisions of the Act which he cites (R. 537).

4

The Question Actually Presented by the Record

As stated and established above, the petitioners seek to present a question which has no basis or foundation in the record. It is elementary that upon an appeal, to say nothing of upon a petition for a writ of certiorari, no question of law can be considered which the record does not present.

What the petitioners are asking is that this Court decide moot, abstract or academic questions not applicable to the instant case.

This Court has repeatedly held that this it will not do. (*United States* v. *Alaska Steamship Co.*, 253 U. S. 113, at page 116; *Lawrence P. Mills* v. *W. Briggs Green*, 159 U. S. 651, at page 653; *People of the State of California* v. *San Pablo & Tulare Railroad Co.*, 149 U. S. 307, at page 314.)

The legal question actually presented by this record is:

Whether the trial court erred in holding that defendants in a suit under the Federal Employers' Liability Act had no right to a reduction of plaintiff's damages by reason of the provisions of the Railroad Retirement Act of 1937 where plaintiff was "*not totally and permanently disabled for regular employment for hire.*"

Argument

POINT A

The evidence in the record does not allow the petitioners to raise in this court the question which they seek to present as Question No. (1) in their petition, to wit: "(1) Whether the trial court erred in holding that defendants in a suit under the Federal Employers' Liability Act had no right to a reduction of plaintiff's damages by reason of the provisions of the Railroad Retirement Act of 1937 regardless of whether or not plaintiff was *totally and* permanently disabled for regular employment for hire", because the trial court, pursuant to stipulation of the parties found as a finding of fact that "upon the record * * * it cannot be found that the nature of plaintiff's injury is such that, notwithstanding its seriousness and probable permanent continuation, he would be prevented thereby from following any substantial gainful occupation. At most the evidence establishes that this plaintiff will be unable to follow his former occupation, but it does not establish within the requirements of legal evidence that he is disabled for all work. This is substantially the norm provided by Section 228b, Subdivision a (3), and the defendants, upon whom the burden of establishing the defense rests, have failed to satisfy the requirements for a finding justifying the application of the foregoing provision".

Section 228b of the Railroad Retirement Act of 1937 makes eligible for annuities, once they have ceased to render compensated service to the carrier, the following persons:

(1) individuals who shall be 65 years of age or over;

(2) individuals who shall be 60 years of age or over, and

(a) shall have completed 30 years of service, or

(b) shall have become totally and permanently disabled for regular employment for hire;

(3) individuals, without regard to age, who shall have completed 30 years of service and who are totally and permanently disabled for regular employment for hire.

The parties stipulated that the Trial Court after the jury's verdict could dispose of the question of fact as to whether the plaintiff was totally and permanently disabled for regular employment for hire (R. 465), and they also stipulated that the Court decide the entire question as to whether or not the defendants were entitled to a deduction from the jury's verdict under any of the other provisions of the Railroad Retirement Act of 1937 (R. 433-434, 436, 464-465).

The Court's opinion on this question is found in the Record at pages 530-537, and the Trial Court resolved this question of fact in favor of the plaintiff, and found that the plaintiff was not totally and permanently disabled for regular employment for hire within the meaning of the language set forth in the statute, and wrote at page 536:

> "Upon the record before this Court it cannot be found that the nature of plaintiff's injury is such that, notwithstanding its seriousness and probable permanent continuation, he would be prevented thereby from following any substantial, gainful occupation. At most the evidence establishes that this plaintiff will be unable to follow his former occupation, but it does not establish within the requirements of legal evidence that he is disabled for all work. This is substantially the norm provided by Section 228b, subdivision a (3), and the defendants, upon whom the burden of establishing the defense rests, have failed to satisfy the requirements for a finding justifying the application of the foregoing provision."

On the appeal from the judgment entered at Trial Term to the Circuit Court of Appeals for the Second Circuit, the petitioners did not question this finding of the Trial Court,

and in petitioners' brief in the Circuit Court of Appeals below they stated at page 23:

> "In view of the trial court's finding that plaintiff was not totally and permanently disabled within the meaning of the Retirement Act, *it is now open to defendants only to contend* for a reduction because of the annuity plaintiff will be entitled to receive upon reaching the age of 60 years;" (Italics ours.)

The Circuit Court of Appeals in its opinion wrote at page 555 of the Record as follows:

> "The parties stipulated that the trial judge should decide on the evidence whether the plaintiff was totally and permanently disabled for regular employment for hire and whether the verdict should be reduced because of the above noted statutes. The judge failed to find that the plaintiff was so disabled as presently to be entitled to an annuity under the Railroad Retirement Act and we do not understand the appellants question that finding. In any event, it was justified by the evidence."

Indeed there is no allegation in the petition here of any error in this finding by the Trial Court, nor is there any complaint made in regard to the legal conclusion based thereon, and it appears that petitioners have no fault to find with reference to this finding to the effect that the respondent is not permanently and totally disabled for regular employment for hire, and, therefore, does not come within the provisions of Section 228b, Subdivision a (3) of the Railroad Retirement Act of 1937, and is, therefore, not entitled to any pension thereunder, and, therefore, there is no question as to whether or not there should be any deduction from the jury's verdict by reason of this Section.

The Trial Court did write at the end of its opinion "For the reasons just stated it is decided as a matter of law that defendants have no right to a reduction of plaintiff's damages in a suit of this nature regardless of whether or

not the injuries were of a total and permanent character" (R. 537).

Petitioners create the impression (p. 3 of Petition) that the Court held that defendants had no right to a reduction "regardless of whether or not plaintiff was totally and permanently disabled for regular employment for hire".

These two statements are, of course, not the same.

A careful reading of the Trial Court's entire opinion on this question (R. 530-537) demonstrates that the Court found

(1) as a fact, that plaintiff was not permanently and totally disabled for regular employment for hire within the meaning of the Act,

(2) that, therefore, defendants were not entitled to a reduction.

The order of the Trial Court was duly settled and entered upon this decision, and provides, in part (R. 538-539):

> "ORDERED that the question of fact as to whether the plaintiff is permanently and totally disabled for regular employment for hire, within the meaning of the language set forth in said Railroad Retirement Act, be and the same hereby is resolved in favor of the plaintiff and against said defendants, the Court having found that the plaintiff is not permanently and totally disabled for regular employment for hire within the meaning of the provisions of the said Railroad Retirement Act;"

Petitioners recognized this when they made the statement in their brief in the Circuit Court of Appeals, heretofore set forth, and the opinion of the Circuit Court, in the portion set forth heretofore, indicates petitioners' attitude on this question.

How then can the petitioners rightfully seek to review in this Court an alleged error by the Trial Court in holding

that they had no right to a reduction of plaintiff's damages regardless of whether or not the plaintiff was totally and permanently disabled for regular employment for hire?

The Trial Court affirmatively found that respondent was not permanently *and totally* disabled for regular employment for hire, and the petitioners did not question this finding in the Circuit Court of Appeals, and indeed they do not appear to question this finding in their petition herein.

Therefore, petitioners' question (1) is not presented by the evidence in the record and is purely academic, and a decision by this Court of this question would have no bearing upon this case and would not be decisive of the facts and law applicable to this case.

POINT B

The Trial Court committed no error in holding that the defendants were not entitled to a reduction of the plaintiff's verdict by reason of any of the other sections of the Railroad Retirement Act of 1937, or by reason of Section 5 of the Employers' Liability Act, and the Circuit Court of Appeals correctly affirmed the decision of the Trial Court in denying any such reduction.

There is established by virtue of the provisions of the Railroad Retirement Act a railroad retirement account from which payments are made. This account is originated and maintained, one-half by the contributions of railroad employees and, one-half by contributions in like amount by the employer.

The amount of contribution is set forth in the Carrier's Taxing Act, Section 262 as to employees, and Section 263 as to employers (U. S. C. A. 45, Supplement, Chapter 10).

By virtue of Section 228b, Subdivision a, (2), the respondent herein becomes entitled to a pension when he

shall have reached 60 years of age and because he had completed 30 years of service.

If the petitioners herein had not injured the respondent, he would have become entitled to this pension, in any event, by reason of this Section of the Act, and he could also have earned wages at any employment other than railroad employment.

Now that petitioners have injured respondent, he will, nevertheless, receive the pension by virtue of this Section of the Act, but he will not be able to earn full wages at any employment other than railroad employment—because he has been permanently partially incapacitated.

As a matter of fact, this plaintiff did not claim and did not attempt to prove that he would not be able to earn anything in some employment other than railroad work. The plaintiff contended that there was other work that he might well do. The jury had a right to give him damages for the diminution in his earning capacity, and this could not be rightfully diminished by any pension he would receive by virtue of the Retirement Act, because that was paid to him as a result of his status.

The jury in agreeing on the amount to be awarded as damages considered this impairment of ability to earn wages and the pension awarded by virtue of this Section of the Railroad Retirement Act is not given by the Act in place of, but in addition to, wages.

In other words, the respondent could receive his annuity when he had reached the age of 60, having completed 30 years of service, and he could also, if not injured, secure employment at any kind of work, provided only that he resign from railroad work.

In this connection we refer to a record of hearings before the Committee on Interstate Commerce of the United States Senate, Seventy-Fifth Congress, on Senate Bill 2395, which was subsequently enacted as the Railroad Retirement Act, and which was submitted to the trial court in con-

nection with the briefs. On page 53 thereof it appears that Mr. R. V. Fletcher, representing the Association of American Railroads, stated as follows:

> "I am reminded by my friend, Mr. Hay, of a matter that I should mention so that it may be perfectly clear. While under this law, as finally amended—using my illustration of a moment ago—a railroad man who has gone into the service of the steel corporation must relinquish his employment with the steel corporation and cannot go back to the railroad, if he wishes to receive his pension, notwithstanding there is nothing in this law to prevent him from doing other work.
>
> Senator Barkley: In other words, he is permitted to enjoy what he has earned in the way of a retirement status? If he wishes to do other work that he is able to do, he may do it?
>
> Mr. Fletcher: It is a little broader than that: He is free to go anywhere he pleases, except that he cannot go back to the railroad service; and if he was gainfully employed at the time of retirement, he cannot go back to that service. But he is free to go anywhere else; if he is a lawyer, he can practice law.
>
> Senatore White: But when his retirement rights have actually begun, he can go to any other employment he wishes?
>
> Mr. Fletcher: Yes. He can go to the farm—and we find that many have taken up farming—or into the mercantile business, or into any of the thousand things that our experience indicates a retired railroad man can do. Generally that privilege is afforded to the men by the existing railroad retirement plans. I know of men who have retired and have gone out and gotten into other work and have found work that was as lucrative, perhaps, as the work they did for the railroad."

Therefore, had not these defendants injured the plaintiff and impaired his ability to earn wages after the age of 60 he could at that time receive his annuity and at the same time continue to earn full wages at any occupation other than railroad work.

It is this impairment in the amount of future earnings that the jury properly took into consideration, and the plaintiff will be losing these future wages because his ability to earn them was impaired by defendants' negligence, and the annuity that he will receive at the age of 60 will be in addition to and not in place of the earnings.

Under the Act the defendants have paid 2¾% of the wages paid to the plaintiff in 1937, which total wages were $2,306.91, and in 1938 $1,640.07, making total wages of $3,946.98, and therefore the defendants have contributed $108.54 to the fund from which the plaintiff will receive annuities.

The plaintiff made a like contribution.

The Trial Court very succinctly summed up the entire situation in its opinion at pages 536-537 of the Record as follows:

> "It is enough to state that defendants ignore the salient fact that the contributions, upon the basis sought to be set off, have relation to the age provisions of the Act and there is no nexus between the purpose for which the contributions in this regard were made and the purpose for which damages in this negligence action are awarded."

The Circuit Court of Appeals affirmed the decision of the Trial Court and wrote on this question as follows at page 555 of the Record:

> "Nevertheless, appellants insist that they are entitled to a reduction of the plaintiff's judgment by the amount of the annuity he will be eligible to receive upon reaching the age of 60 (not yet attained), computed upon his life expectancy; and in the alternative, to a reduction to the extent of their contribution to such annuity.
>
> Sec. 5 of the Employers' Liability Act confines the set off to a sum contributed or paid to any insurance, relief benefit, or indemnity that may have been paid on account of the injury for which the action was brought. There is no such sum available for any set off since no payments have been made and there could be one only

> by virtue of the Railroad Retirement Act of 1937. The plaintiff has not been brought by his injuries within any class entitled to benefit under the provisions of that Act. Nor will any retirement payments made to him in the future, so far as the proof in this record shows, ever be made on account of the injuries for which this suit was brought. If they are ever made at all, it will be on account of his reaching the retirement age regardless of his injuries. His loss because of his injuries has, therefore, no relation to any future benefits he may receive under the Railroad Retirement Act of 1937 and whatever sums the appellants may have contributed or paid because of that statute do not come within the set off provisions of Sec. 5 of the Employers' Liability Act."

The petitioners erroneously argue on page 7 of their petition "since a pension is given as a form of wages or in lieu of wages, the recipient of one is to that extent cutting down his future wage loss". Under the Railroad Retirement Act of 1937 the pension given by virtue of the Act when the recipient has reached 60 years of age—and provided that he shall have completed 30 years of service—is not given as a form of wages or in lieu of wages, but is given in addition to the wages that he may earn in any form of employment other than railroad work.

So, in this case the pension which the respondent will receive will not be in lieu of the wages which he would have earned had he not been injured. He would receive the pension under this Section of the Act regardless and irrespective of any injury.

The statement made by the petitioners in their petition that a number of lower courts have also passed on this matter "under various fact situations" and have in every case except the present one ruled in their favor, is of no value here. The statement that the decisions of the lower Courts were made "under various fact situations" unequivocally demonstrates that they are of no value because we do not know that any of the fact situations in those cases were similar to or the same as the fact situation in this case.

The petition does not state that in any of these alleged cases was any opinion written, and we cannot know whether or not the facts in any of these cases had any application to the only question (so far as Retirement Act is concerned) which is presented in the instant case.

In addition, none of the cases cited in this regard by the petitioners are in any Circuit Court of Appeals.

It is respectfully submitted that there is no uncertainty in the Federal or State Courts upon this question.

Neither is the decision of the Circuit Court of Appeals here "probably in conflict with the applicable decisions of this Court." What "applicable decisions of this Court"? There are none, and petitioners cannot claim there are any.

The decision of the Circuit Court of Appeals is concise and correct. It does not allow the respondent to recover for loss of future earnings without regard for the diminution of that loss in the form of a pension, but it does in fact allow him to keep the pension which is given to him by law regardless of any injury, and at the same time recover for loss of wages due to the impairment of his ability to earn wages when that ability to earn wages has been impaired by the negligence of the petitioners.

We contend that upon this record the petitioners have not presented, and cannot present, any doubtful or even arguable proposition of law which was and is essential to plaintiff's success.

CONCLUSION

We Respectfully Submit that the Petition be Denied.

THOMAS J. O'NEILL,
Attorney for the Respondent.

THOMAS J. O'NEILL,
JOSEPH G. SAILE,
of Counsel.

Appendix.

STATUTES INVOLVED.

Section 1 of the Federal Employers' Liability Act, 45 U. S. C. A. §51, reads as follows:

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

Section 5 of the Federal Employers' Liability Act, 45 U. S. C. A. §55, reads as follows:

> "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided,* That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on ac-

count of the injury or death for which said action was brought."

Section 2 of the Railroad Retirement Act of 1937, 45 U. S. C. A. §228b, reads in part as follows:

"(a) The following-described individuals, if they shall have been employees on or after the enactment date, shall, subject to the conditions set forth in subsections (b), (c), and (d), be eligible for annuities after they shall have ceased to render compensated service to any person, whether or not an employer as defined in section 228a (a) (but with the right to engage in other employment to the extent not prohibited by subsection (d)):

1. Individuals who on or after the enactment date shall be sixty-five years of age or over.

2. Individuals who on or after the enactment date shall be sixty years of age or over and (a) either have completed thirty years of service or (b) have become totally and permanently disabled for regular employment for hire, but the annuity of such individuals shall be reduced one one-hundred-and-eightieth for each calendar month that they are under age sixty-five when the annuity begins to accrue.

3. Individuals, without regard to age, who on or after the enactment date are totally and permanently disabled for regular employment for hire and shall have completed thirty years of service.

Such satisfactory proof of the permanent total disability and of the continuance of such disability until age sixty-five shall be made from time to time as may be prescribed by the Board. If the individual fails to comply with the requirements prescribed by the Board as to proof of the disability or the continuance of the disability until age sixty-five, his right to an annuity under subdivision 2 or subdivision 3 of this subsection

by reason of such disability shall, except for good cause shown to the Board, cease, but without prejudice to his rights under subdivision 1 or 2(a) of this subsection. If, prior to attaining age sixty-five, such an individual recovers and is no longer disabled for regular employment for hire, his annuity shall cease upon the last day of the month in which he so recovers and if after such recovery the individual is granted an annuity under subdivision 1 or 2(a) of this subsection, the amount of such annuity shall be reduced on an actuarial basis to be determined by the Board so as to compensate for the annuity previously received under this subdivision.

(b) An annuity shall be paid only if the applicant shall have relinquished such rights as he may have to return to the service of an employer and of the person by whom he was last employed; but this requirement shall not apply to the individuals mentioned in subdivision 2(b) and subdivision 3 of subsection (a) prior to attaining age sixty-five.

* * * * * * * * *

(d) No annuity shall be paid with respect to any month in which an individual in receipt of an annuity hereunder shall render compensated service to an employer or to the last person by whom he was employed prior to the date on which the annuity began to accrue. Individuals receiving annuities shall report to the Board immediately all such compensated service."

Section 3 of the Railroad Retirement Act of 1937, 45 U. S. C. A. §228c, reads in part as follows:

"(a) The annuity shall be computed by multiplying an individual's 'years of service' by the following percentages of his 'monthly compensation': 2 per centum of the first $50; 1½ per centum of the next $100; and 1 per centum of the next $150."

Appendix.

Section 10 of the Railroad Retirement Act of 1937, 45 U. S. C. A. §228j, reads in part as follows:

"(a) There is hereby established as an independent agency in the executive branch of the Government a Railroad Retirement Board, to be composed of three members appointed by the President, by and with the advice and consent of the Senate. * * *

* * * * * * * * *

(b) 3. The Board shall from time to time certify to the Secretary of the Treasury the name and address of each individual entitled to receive a payment, the amount of such payment, and the time at which it should be made, and the Secretary of the Treasury through the Division of Disbursements of the Treasury Department, and prior to audit by the General Accounting Office, shall make payment in accordance with the certification by the Board."

Section 12 of the Railroad Retirement Act of 1937, 45 U. S. C. A. §228*l*, read as follows:

"No annuity or pension payment shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated."

Section 15 of the Railroad Retirement Act of 1937, 45 U. S. C. §228*o*, reads in part as follows:

"(a) There is hereby created an account in the Treasury of the United States to be known as the Railroad Retirement Account. There is hereby authorized to be appropriated to the account for each fiscal year, beginning with the fiscal year ending June 30, 1937, as an annual premium an amount sufficient, with a reasonable margin for contingencies, to provide for the

payment of all annuities, pensions, and death benefits in accordance with the provisions of this Act and the Railroad Retirement Act of 1935. Such amount shall be based on such tables of mortality as the Railroad Retirement Board shall from time to time adopt, and on an interest rate of 3 per centum per annum compounded annually. The Railroad Retirement Board shall submit annually to the Bureau of the Budget an estimate of the appropriation to be made to the account."

Section 2 of the Carriers Taxing Act of 1937, I. R. C. §1500, 26 U. S. C. A. §1500, reads in part as follows:

"(a) In addition to other taxes, there shall be levied, collected, and paid upon the income of every employee a tax equal to the following percentages of so much of the compensation of such employee as is not in excess of $300 for any calendar month, earned by him after December 31, 1936— * * *"

Section 3 of the Carriers Taxing Act of 1937, I. R. C. §1520, 26 U. S. C. A. §1520, reads in part as follows:

"(a) In addition to other taxes, every employer shall pay an excise tax, with respect to having individuals in his employ, equal to the following percentages of so much of the compensation as is not in excess of $300 for any calendar month paid by him to any employee for services rendered to him after December 31, 1936: * * *"

Section 7 of the Carriers Taxing Act of 1937, I. R. C. §1530, 26 U. S. C. A. §1530, reads in part as follows:

"(a) The taxes imposed by this subchapter shall be collected by the Bureau of Internal Revenue and shall be paid into the Treasury of the United States as internal-revenue collections."